In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 219

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Claims

Petition for Certiorari Filed June 5, 1967

Certiorari Granted October 9, 1967

BRIEF FOR THE PETITIONERS THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

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The Scheffer Press, Inc.—ANdover 3-6850

TABLE OF CONTENTS

PAGE

Table of Cases, Text Books, and Statutes

Cases

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BRIEF FOR THE PETITIONERS THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

The Peoria Tribe of Indians of Oklahoma, et al., pursuant to the order of this Court entered October 9, 1967, granting their petition for certiorari, submit this brief on the merits of their appeal.

OPINION BELOW

The opinion of the Court of Claims, December 16, 1966, in which three of that Court's five judges were joined, and the dissenting opinion of the other two, are reprinted in the Appendix (A. 68, 75). The case is reported at 369 F. 2d 1001.

JURISDICTION

The judgment of the Court of Claims was rendered on December 16, 1966; rehearing was denied on March 17, 1967. The petition for a writ of certiorari was filed on June 5, 1967. The order granting the writ of certiorari was entered October 9, 1967. The jurisdiction of this Court is invoked under Section 20 of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70s (c) and 28 U.S.C. 1255.

TREATY INVOLVED

Article 7 of the treaty of May 30, 1854, 10 Stat. 1082, 1084, between petitioners and the United States, in part, provides:

> • • • And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

The complete treaty (10 Stat. 1082-1087) is reprinted in the Appendix (A. 101-109).

QUESTION PRESENTED

Under a treaty which provides that the President may pay to an Indian tribe or invest for its benefit the proceeds of its lands to be sold by the Government as a trustee, is the Government liable (as a private trustee would be) for failure to invest proceeds not realized by reason of a deliberate breach of its trust by the Government?

STATEMENT OF THE CASE

On May 30, 1854, the effective date of the Kansas-Nebraska Act, 10 Stat. 277, which opened Kansas to white settlement, a treaty was concluded whereby the petitioners ceded part of their reservation in trust to the United States, which undertook to offer the lands for sale at public auction, and to pay the proceeds, less expenses, to the Indians, subject to the following provision (Article 7, A. 105-6):

> And as the amount of the annual receipts from the sale of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

Following the Kansas-Nebraska Act, and the Act of July 22, 1854, 10 Stat. 308, which opened ceded Indian lands in Kansas to pre-emption (*i.e.*, the statutory right of the first settler to acquire 160 acres of the public lands at a fixed price), "settlers, investors and speculators" squatted on the petitioners' land and claimed

rights of pre-emption thereto. (15 Ind. Cl. Comm. 123, 143-4, A. 36). In response to a request of the Secretary of the Interior for a legal opinion, the Attorney General stated that the allowance of pre-emption rights under this and two other treaties (for the other two see 10 Stat. 1048 and 10 Stat. 1069) "would be a violation of the treaties, a breach of trust, a fraud upon the Indians." (Pet. Ex. 166, J 1, p. 26, 15 Ind. Cl. Comm. 123, at 144, A. 36-37).

Nevertheless, under express instructions from the Commissioner of Indian Affairs, the squatters were permitted to buy petitioners' lands at fixed, "appraised" prices, without any auction. The consequence was, as determined by the Indian Claims Commission, that the sum realized was $172,726.04 less than would have been realized under a fair and free auction in accordance with the terms of the treaty, and the Commission awarded judgment to petitioners in that amount. (A. 66A, 67)

The actual proceeds of the sales amounted to $346,671.09 (Finding 27, A. 42). Of this sum, $59,641.24 was paid over to the Indians, and the balance, plus other tribal funds, was invested in state bonds. (A. 92) (The reference in Article 7 to "stocks" apparently signified, in the terminology of the time, the present-day term, bonds. See *Cherokee Nation* v. *United States,* 270 U.S. 476, 492.)

Before the Indian Claims Commission, petitioners claimed both the proceeds that should have been realized, and a return, measured by interest, by reason of the Government's obligation to invest so much of the proceeds as was not paid to the Indians. The Indian Claims Commission allowed the first portion of the claim, but denied the latter. On petitioners' appeal, the Court of Claims, by a divided court, affirmed.

SUMMARY OF ARGUMENT

The amount by which the proceeds of the sales fell short of what they should have been were, by reason of that fact, neither paid nor invested. Petitioners' claim for the resulting loss of interest was rejected by a majority of the Court of Claims on the ground that Article 7 vested discretion in the President to choose between two alternatives, and, had the money been received in 1857 (as it should have been), the President might have paid it to the Indians. The Court below defined the President's discretion as follows: "He could pay the proceeds directly to the Indians; he could *invest* them in 'safe and profitable stocks'; or he could do both." (Emphasis the Court's, A. 42) Employing general rules of construction applicable to the running of interest on claims against the United States, the Court concluded with respect to Article 7 that, "[I]t would be judicial treaty writing for us to read into that agreement an express promise by the Government to pay interest."

Petitioners submit that the majority of the Court of Claims erred:

(1) The majority below speculated that, had the unrealized $172,726.04 been collected in 1857, the President, by virtue of his discretion under Article 7, might have decided that the money be paid to the Indians. If so, it would not have been invested. On that assumption, interest is denied as though the unrealized funds had in fact been realized and paid over to the Indians in 1857. But what the President might have done is wholly irrelevant. It was the Government's breach, not the President's discretion, which dictated the result: The Indians had neither the money nor the investment. Because the money had not been collected, the President was not called upon to exercise his discretion.

(2) The majority's view of the treaty fails to take the *purpose* of the treaty into account. The power of the guardian-trustee to determine to what extent the ward-beneficiary should live within the ward's income or should dip into its capital is not a power to withhold or reduce that capital by wrongful act, or to let the capital lie idle. The evidence of record supports the reasoning in the dissenting opinion that, under this treaty, "The President would not hand over to these dependent Indians more than they needed or could properly use for day-to-day expenses; nor could the Tribe expect to receive more than this." (A. 78.)

(3) Apparently on the assumption (which is not expressed, however) that the meaning of the treaty language is in doubt, the majority applied an improper rule of construction. In this case, however, the meaning of the treaty is not in doubt. If any doubt exists, the rule of construction appropriate to an Indian treaty, ignored by the majority, is that quoted in the dissenting opinion: That Indian treaties ". . . 'are to be construed as far as possible in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people" *Tulee* v. *Washington,* 315 U.S. 681, 684-5' *Choctaw Nation* v. *United States,* 318 U.S. 423, 432 (1943)" and other cases cited.

(4) The appropriate measure of damages which should be assessed against the Government for its breach of Article 7 of the 1854 treaty is the interest on $172,726.04 from the date of the sales, when that sum should have been realized and have become subject to said Article.

ARGUMENT

1. THE GOVERNMENT'S OBLIGATION UNDER ARTICLE 7 IS NOT DIMINISHED BY THE DISCRETION WHICH THE PRESIDENT MIGHT HAVE EXERCISED IN 1857 HAD THE GOVERNMENT NOT BREACHED THE TREATY.

A majority of the Court of Claims found that under Article 7, the President would have had the choice of paying over to the Indians the sum which should have been realized, or of investing it on their behalf. Because of the existence of this choice, the majority finds that Article 7 was *discretionary* and did not constitute a *promise.* (See *inter alia* Note 8 to the Court's opinion, A. 74.) Equating the choice open to the President under Article 7 with the absence of a promise is a confusion containing unexpressed assumptions which are contrary to law and fact.

In the first place, the existence and purpose of vesting discretion in a public official are, as a matter of law, consistent with duty and obligation, not antithetical, as the Court below assumes. In *Mason* v. *Frearson,* 9 How. 248, 259, this Court held as an established rule the principle that discretion in legislative enactments is required to be exercised in favor of the parties for whose benefit it was conferred:

> Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds they ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty".

Article 11 of the 1854 treaty explicitly notes that, "The object of this instrument [is] to advance the interests of said Indians. . ." and it is clear that the power in Article 7 is conferred upon the President for the *benefit* of the Peoria Indians, thus bringing this case under the rule. (An Indian treaty is equivalent to the act of a legislative body: *United States* v. *43 Gallons of Whiskey,* 93 U.S. 188, 196; *Firks & Elam* v. *Neilson,* 2 Pet. 314.) In addition to *Mason* v. *Frearson,* other cases to the same effect are *Supervisors* v. *United States,* 4 Wall. 435, 18 L. Ed. 419 (wherein the words "may, if deemed advisable", were under this doctrine, held to require public officers to act); *City of Galena* v. *Amy,* 72 U.S. 705 (wherein "may, if said city council believe that the public good and best interest of the city require" was held to confer so clear a duty that a writ of mandamus would issue to compel action); *Wilson* v. *United States,* 135 F 2d 1005 (CCA 3); *Chase* v. *United States,* 261 Fed. 833, 837, affirmed 256 U.S. 1. It is appropriate to apply the rule of these authorities to this case, since as noted more particularly in 2 following, the *purpose* of these and other provisions in the 1854 treaty was to impose the discretion in the President for the very purpose of withholding the Indians' capital from their own improvident hands.

Further, the discretion is not material because the Government's breach made its exercise impossible. The money was neither paid to the Peoria Indians in 1857 nor invested because it was not collected. It was not collected because the Government breached its treaty. The breach prevented the President from exercising either course open to him under the treaty.

The majority below regards the President's discretion as limited to a choice between payment and investment, but the effect of the decision is to condone, without

saying so, a third course by the President, *i.e.*, to do neither. The result appears to be inconsistent with the Court's own reasoning. The result is certainly inconsistent with the duties of the trustee to see to it that the Indians' capital, if not available to the Indians, was productively employed.

The fact that there was an option to pay rather than invest cannot affect funds which the United States by its own breach divested itself of power either to pay or to invest. This Court had before it a similar situation in *Mille Lac Chippewas* v. *United States,* 229 U.S. 498. The Act of January 14, 1889, 25 Stat. 642, provided for the sale of timber lands of the Mille Lac Chippewas and the deposit of the proceeds in the Treasury to draw interest at 5 percent per annum. Instead of selling the lands as timber lands, the Government permitted the lands to be settled under the Public Land Laws, which brought a lower return to the Indians. The United States was held liable for the unrealized proceeds plus interest as provided in the statute. As in the case of the Peoria treaty, the statute provided an option to utilize part of the principal for the benefit of the Indians. Sec. 7, 25 Stat. 645. In the *Mille Lac* case the option was to be exercised within the discretion of Congress, not in the discretion of the President, and the option was limited to 5 percent of the principal and not unlimited, as in the present case. But who may exercise the option, and the extent to which it may be exercised, has no bearing on the result. Since the Indians had a right to interest on the proceeds of land sales, they were held to have a right to interest on the proceeds which should have been realized had the land sales been properly conducted, and the right was not read out of the statute by reason of the alternative available to the United States. Whether the United States simply withholds funds which it is

required to invest, or whether the funds remain with land buyers in whose interest the Government's breach of trust occurred (as is the case here), should likewise have no bearing on the Government's liability. See also *United States* v. *Blackfeather,* 155 U.S. 180, 192; *Menominee Tribe* v. *United States,* 107 C. Cl. 23, 33, 67 F. Supp. 972, 975 (1946).*

The majority of the Court of Claims erred in its view that the vesting of discretion in the President by Article 7 of the 1854 treaty was necessarily inconsistent with an obligation to exercise that discretion in favor of the Peoria Indians. Petitioners submit that the opposite is the case, and that the Government's first treaty breach (its failure to sell the lands at fair auction as required by Article 4) does not excuse the Government's second breach (its failure to exercise the trust which it assumed by Article 7).

2. TREATING UNREALIZED FUNDS AS IF THEY HAD BEEN PAID DEFEATS THE PURPOSE OF THE TREATY, WHICH WAS TO PAY IMPROVIDENT INDIANS ONLY SO MUCH AS THEIR IMMEDIATE NEEDS REQUIRED AND TO INVEST THE REMAINDER FOR THEIR BENEFIT.

Considering unrealized funds as proceeds which might not have been paid in 1857, and consequently might not have been invested, the Court below concluded, now that the funds are finally to be paid in fact, that they should be treated as uninvested and therefore as non-interest

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* The fact that funds were not made available in 1857 was not the basis of the decision in the Court below. The majority accepted the proposition that, if the treaty is to be construed as carrying an obligation to pay interest on uninvested funds, such interest would be payable on the unrealized proceeds (See A. 73-4).

bearing funds. Such a construction ignores one of the central purposes of the treaty; namely, that of providing for and obtaining the Indians' acknowledgement of their improvidence and putting them on notice that the President did not intend for them to have immediate use of all the funds, but that he intended to invest them for their benefit.

In this connection, it should be noted that the 1854 treaty provides that, even as to monies which are to be paid immediately thereunder, that the President may withhold payment to any who "become intemperate or abandoned, and waste their property" (Article 9, A. 106); that the Peorias will "renew their efforts to prevent the introduction and use of ardent spirits. . . . to encourage industry, thrift, and morality, and by every means promote their advancement in civilization" (Article 10, A. 106-7); that because "the object of the instrument [is] to advance the interest of the Indians, it is agreed" that the United States can unilaterally determine to manage their affairs (Article 11, A. 107). In the references to illiterate Indians in danger of becoming intemperate and abandoned, and of wasting their lands, threatened by the use of ardent spirits and needing encouragement in industry, thrift, morality and civilization, the United States was formally recognizing that the Indians were not competent to manage their own affairs so that the Government was required to undertake that management for them. The proviso of Article 7 served notice upon the Indians that the Government intended to invest, rather than pay over, the bulk of the proceeds which, after the treaty was carried out, would be the Indians' only remaining capital.*

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* The same treaty which specified that the President on consultation might determine how much of the proceeds

As stated in the dissenting opinion (A. 78):

> . . . the possibility that the President might have immediately turned over the whole $172,000 to the Indians, if it had been paid in 1857, without retaining any for investment . . . is, of course, a theoretical possibility, but it seems very unlikely as a practical matter. The President would not hand over to these dependent Indians more than they needed or could properly use for day-to-day expenses; nor could the Tribe expect to receive more than this.

The minority inference from the treaty language is in fact borne out by the evidence, since as appears from the report of the General Accounting Office, only a small part (approximately 15%) of the proceeds actually received from the land sales were turned over to the Indians. The sum of $59,641.45 was disbursed to the Indians and most of the remainder was invested in bonds.** (A. 91-4, General Accounting Office Report) The same General Accounting Office Report shows that when some of the state bonds were stolen while in the custody of the Secretary of the Interior, the loss was made good. By the Act of July 12, 1862, 12 Stat. 539, 540, the funds represented by the stolen bonds were replaced by a credit in the United States Treasury which was to earn interest at the rate of 5 percent per annum. Thus, as actually carried out by the Government in the years immediately following the treaty, most of the funds realized from the land sales were invested to return interest. When the bonds in which the funds were invested were stolen from

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* (Continued)
of the sale be paid and how much invested, also provided for the expenditure of the capital represented by the Indians' permanent annuities which were being commuted. (Article 6-7, A. 105-6)

** Apparently in state bonds bearing interest at 6% (A. 93).

the Government's custody, they were replaced by an interest-bearing fund in the United States Treasury.

It thus appears that the United States regarded its obligation under the 1854 treaty as one to invest or to pay a return as though funds were invested. A similar return should have been earned on the amount by which the capital was reduced by the Government's breach of trust in this case. In private trust law, it is the duty of a trustee to invest funds so that they will be productive of income; if he fails to do so, he commits a breach of trust. II *Scott on Trusts* 1348, § 181; *Restatement of Trusts Second* 391, § 181. If the trustee breaches his trust by failing to invest, he will be liable for that "which he should have received," or the legal rate of interest. II *Scott on Torts* 1534, 1554, §§ 207.1, 211; *Restatement of Trusts Second* 469, 479, §§ 207, 211. The Government's attitude and its conduct show that it believed that it had assumed the normal obligation that a trustee assumes in similar situations. The majority of the Court of Claims erred in ignoring the purposes of the treaty and the standards of the obligation of a trustee in this instrument that the Government itself had recognized.*

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* The Court may be interested in knowing that Commissioner of Indian Affairs Manypenny, who negotiated the treaty here, also negotiated a similar treaty two weeks earlier with respect to a small reservation of the Iowa Indians, Article 5 of which is similar to Article 7 of the treaty here (10 Stat. 1069, 1070). In explaining the meaning of this provision to the Iowa, Commissioner Manypenny stated:

> The money they will get from the sales of their land will come in greater amount than they will require—he fix it in the treaty by investing what will not be required by their wants. [Journal of Conference with the Ioways, National Archives Microfilm, T494, Roll 4, Frames 0089-0093; typewritten copy filed as Petitioners' Exhibit No. 76, Indian Claims Commission, Docket No. 79-A]

3. DOUBTS, IF ANY, AS TO THE MEANING OF THE LANGUAGE OF THE TREATY ARE REQUIRED TO BE RESOLVED IN FAVOR OF THE INDIANS, NOT IN FAVOR OF THE GOVERNMENT.

Petitioners submit that the Court below erred in its construction of the treaty in two ways: first, it drew erroneous inferences from the use of the word "may" in Article 7, and second, it applied an improper rule of construction to resolve a supposed ambiguity.

Although the Court leaned heavily on the word "may" as allowing discretion and therefore subjecting the Government to no obligation, upon analysis it is apparent that the meaning of Article 7 is not affected if "shall" is substituted for "may", viz.:

> [I]t is agreed that the President may [shall], from time to time, and upon consultation with the Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested . . .

As to each dollar of receipts, whether the word be "may" or "shall", the President is authorized to "determine" only which of two alternatives should be followed, payment or investment. It is not contended, and cannot reasonably be contended, that the President could by refusal to "determine" at all, leave receipts both unpaid and uninvested.

In the majority opinion, the word "may" is contrasted with the "clear and explicit language" necessary to express "an affirmative, clear-cut obligation" to invest, or to pay interest. Thus the treaty provision in question was deemed to be ambiguous, or at least not "clear and explicit", and the Court then applied the rule of strict construction of the sovereign's liability for interest.

Petitioners submit that Article 7 is quite clear and explicit and not subject to the uncertainties found by the Court below. Money obtained from the land sales was in part to be paid over and in part invested, leaving it in the President's discretion to determine the shares to be assigned to each category.

However, if there be any doubt as to the intention of the parties to the instrument, the Court below chose the rule which applies to ordinary contracts and claims against the United States, completely ignoring the rule which this Court has consistently applied to Indian treaties.

The dissenting opinion summed up the proper rule as follows:

> In resolving this question, we must remember that Indian treaties "are not to be interpreted narrowly, as sometimes may be writing expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." *United States* v. *Shoshone Indians,* 304 U.S. 111, 116 (1938). "[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' *Tulee* v. *Washington,* 315 U.S. 681, 684-5." *Choctaw Nation* v. *United States,* 318 U.S. 423, 432 (1943).[1]

[1] The Supreme Court has often indicated that, where possible, such treaties are to be interpreted liberally in favor of the Indians. See *The Kansas Indians,* 5 Wall. (72 U.S.) 737, 760 (1866); *Choctaw Nation* v. *United States,* 119 U.S. 1, 27-28; *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899); *Minnesota* v. *Hitchcock,* 185 U.S. 373, 396 (1902). *United States* v. *Winans,* 198 U.S. 371, 380-81 (1905).

The decision below is in direct conflict with the prevailing law governing Indian treaties. The majority's construction takes a supposedly doubtful provision and construes it in a way which relieves the Government of liability for a deliberate breach of trust, to the damage of the Indian party to the treaty.

* * *

The rules of construction of contracts generally also favor petitioners' interpretation.

As is said in 17 Am Jur 2d 643 (Contracts § 250), ". . . it is widely held that where the language of a promisor may be understood in more senses than one, it is to be construed in the sense in which he had reason to suppose that it was understood by the promisee." Or as it is put at 17 Am Jur 2d 688 (Contracts, § 275):

> It is often said that, if other things are equal, an interpretation most beneficial to the promisee will be adopted when the terms of an instrument and the relationship of the parties leave it doubtful whether words are used in an enlarged or restricted sense. Conversely it is said that everything is to be taken most strongly against the party on whom the obligation of the contract rests, or that contracts are to be construed in favor of the promisee and against the promisor. * * *
>
> It is also said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist.

In the case at bar, the defendant is both the promisor and the party who drafted the instrument.

In the following section (17 Am Jur 2d 689, Contracts § 276), it is stated that:

> It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected the language * * *

and

> Also, in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it * * *

which in the case at bar is the Government.*

5. THE PROPER MEASURE OF DAMAGES FOR THE GOVERNMENT'S BREACH OF ARTICLE 7 IS THE INTEREST WHICH WOULD HAVE BEEN EARNED HAD THE GOVERNMENT COMPLIED WITH THE TREATY PROVISION.

As the dissenters noted, "that the directive to invest [in Article 7] referred to 'safe and profitable *stocks*', with 'the *interest*' to be paid over to or expended for the Tribe (emphasis added)" (A. 77), is equivalent to an agreement to pay interest (A. 77-78):

> To borrow the language of the Supreme Court in the *Blackfeather* case, *supra*, 155 U.S. at 172, "While this is not literally an agreement to pay interest, it has substantially that effect." In *Blackfeather*, the provision was in the form of an annuity measured by five percent on the Indians' money, but the Court looked through this shell to see that the treaty-parties intended the Indians to receive the normal proceeds from their funds. Here the treaty refers to "stocks" and "interest" from those stocks, but it seems clear that the signatories likewise desired the Indians to receive the increment normally earned (if they were not to have the money in their own hands). For some years before this 1854 treaty, the Federal Government had construed similar agreements calling for investments in "safe and profitable stocks" yielding "interest" of not less than five per cent as being satisfied by an appropriation, from year to year, of a sum equal to five percent interest. See Annual Report of the Commissioner of Indian Affairs, Nov. 30,

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* These rules should be considered in light of the fact that the Indian delegates who signed the treaty were illiterate (A. 108) as was the interpreter who translated the treaty for them. (A. 108)

1852, p. 10 (H. Dock. 1, pp. 300-01); Annual Report of the Commissioner of Indian Affairs, 1853, pp. 10-12 (H. Doc. 1, p. 263).[3] The only change in the 1854 treaty was the deletion of the specific reference to five percent; the reason for this change seems to have been the wish to assure the Indians the possibility of a greater amount obtainable from private investments, not to cut off the Indians right to the fair proceeds of their moneys which were retained by the Government and not handed over to them. *Ibid.* That right was preserved.

As *noted above* (page 13), the standard for measuring damages by reason of a failure of a private trustee to invest is similarly that which he should have received, or the legal rate of interest.

As noted in the General Accounting Office Report (A. 91-94), on such funds as were invested by the Government pursuant to Article 7 of the treaty (being 85% of the proceeds of sale), the petitioners actually received 6 percent through 1860 and 5 percent thereafter. The rate of interest which the Government has paid on Indian funds (and as noted by the dissenters in the above passage, obligations to invest in safe and profitable stocks were considered in the 1850's to be the equivalent of covenants by the United States to pay interest on such funds) is 5%, except that for a period from November 9, 1934 the rate was reduced to 4% because of the depression. *Alcea Band of Tillamooks,* 115 C. Cls. 463, 518 (1950), reversed on other grounds, 341 U.S. 48. The statute presently provides for 4% on Indian trust funds. 25 U.S.C. 161a.

There has been no suggestion that, assuming that the United States is obligated by Article 7 to invest, any lower standard is applicable, that any lower standard would be in accord with the authorities, or would be just. As this Court said in *Mille Lac Chippewas* v. *United States,* 229 U.S. 498, 509:

> As before stated, the lands not within the proviso were disposed of, not under the act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights. This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle it is as if the lands had been disposed of conformably to the act of 1889, and the net proceeds placed in the trust fund created by § 7, and the government then had used the money, not for the benefit of the Indians, but for some wholly different purpose.

What is the resulting loss for which the Indians are entitled to recover? ". . . [T]he prices that would have been controlling had the act of 1889 been rightly applied", including interest, and such was assessed on remand. 51 C. Cls. 400.

CONCLUSION

Petitioners respectfully submit that this Court should reverse the decision of the Court of Claims and should remand this case to the Indian Claims Commission with directions to enter an additional judgment in favor of petitioners for interest, on $172,726.04, at the rate of 6 percent from June 1857, the date of the last sales, through 1860; 5 percent from 1860 to November 9, 1934, and such rate of interest the Court deems appropriate thereafter.

Respectfully submitted,

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